17-546

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 252.

MARY E. MYERS, WIDOW OF GEORGE MYERS, DECEASED, IN HER OWN RIGHT AND AS NEXT FRIEND OF ARTHUR H. MYERS, ETHEL P. MYERS, AND ELMER K. MYERS, INFANT CHILDREN AND HEIRS AT LAW OF GEORGE MYERS, DECEASED; CAROLINE KELLOCK AND HER HUSBAND, CORNELIUS M. KELLOCK, ROBERT C. MYERS, GEORGE B. MYERS, KATE M. MYERS, AND JAMES C. MYERS, HEIRS AT LAW OF GEORGE MYERS, DECEASED, PLAINTIFFS IN ERROR,

vs.

FREDERICK J. SWANN, ALEXANDER D. WADDELL AND HIS WIFE, LUCY, FREDERICK W. SWANN, F. J. SWANN, JR., BY HIS NEXT FRIEND, FREDERICK W. SWANN; ANN SWANN, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

FILED AUGUST 17, 1880.

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vs.

FREDERICK J. SWANN, ALEXANDER D. WADDELL AND HIS WIFE, LUCY, FREDERICK W. SWANN, F. J. SWANN, JR., BY HIS NEXT FRIEND, FREDERICK W. SWANN; ANN SWANN, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of North Carolina, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Frederick J. Swann, Alexander D. Waddell, and wife Lucy, Frederick W. Swann, F. J. Swann, jr., by his next friend the said Frederick W. Swann; Ann Swann and Mary Hill, William S. London, Henry A. London, jr., Frank London, Ann M. Zimmerman, John R. London, Fred. H. London, Snowdon London & Eliza London, his wife, William L. De Rossett, Thomas C. De Rossett, Armand J. De Rossett, jr., M. J. De Rossett, Catharine G. Meares, Graham Davis & wife Alice, Charles D. Myers and Eliza his wife, and Gabriella DeGordon De Rossett, Robert Cowan De Rossett, Kate De Rossett and Frederick J. Lord, as plaintiffs, and George Myers as defendant, a manifest error hath happened, to the great damage of the said George Myers, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the thirtieth day of March, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] W. J. RIDDICK,
Clerk of the Circuit Court of the United States
Eastern Dist. of N. Carolina.

Allowed by—

2 Circuit court, 4th circuit.

UNITED STATES OF AMERICA,
Eastern District of North Carolina:

Be it remembered, that on the 18th day November, A. D. 1878, W. M. Baldwin, clerk of the superior court of Columbus County, State of North Carolina, filed in the office of the clerk of the circuit court of the United States for the district aforesaid, a transcript of the record of said superior court, in the words and figures following, to wit:

3 STATE OF NORTH CAROLINA:

Be it remembered that a superior court for the county of Columbus is this day assembled and held at the court-house in Whiteville, it being the sixth Monday after the second Monday of August, A. D. 1878,

and the 23d day of September, in said year. Present and presiding the hon. R. P. Buxton, judge.

IN THE MATTER OF FREDERICK J. SWANN, Alexander D. Waddell, and his wife, Lucy, Frederick W. Swann, F. J. Swann, by his next friend, Frederick W. Swann; Ann Swann, and Mary Hill, plaintiffs,
against
GEORGE MYERS, WILLIAM S. LONDON, HENRY A. London, jr., Frank London, Fanny London, Ann M. Zimmerman, John R. London, Fred. H. London, Snowden and Eliza Snowden, his wife, William L. De Rossett, Thomas C. De Rossett, Armand J. De Rossett, jr., M. J. De-Rossett, Catharine G. Meares, Graham Davis and wife Alice, Charles D. Myers, and Eliza, his wife, Gabriella de Gordin De Rossett, Robert Cowan De Rossett, and Kate De Rosset', infants under the age of 21 years, and Frederick J. Lord, defendants.

Bond for costs.

We, F. J. Swann, Ann Swann, F. W. Swann and wife Rebecca A., Alfred D. Waddell and wife Lucy, A. J. Hill and wife Mary, the plaintiffs, and George R. Griffith and R. R. Shem, our executors, are
4 bound to the defendant, George Myers, in the above-entitled action in the sum of two hundred dollars. This obligation to be void upon the condition that the said plaintiffs shall pay to the defendant all such costs as the defendant may recover of the plaintiffs in said action; otherwise to remain in full force and effect.

Witness our hands and seals this 27th day of March, 1873.

M. Q. WADDELL, *Att'y.* [SEAL.]
ANN SWANN. [SEAL.]
A. D. WADDELL & WIFE LUCY.
F. J. SWANN. [SEAL.]
F. W. SWANN & WIFE REBECCA.
A. J. HILL & WIFE MARY.
In the presence of— R. R. GRIFFITH. [SEAL.]
R. R. THREE. [SEAL.]

STATE OF NORTH CAROLINA,
Chatham County:

On this 27th day of March, 1873, before me, personally appeared R. R. Griffith and R. R. Three, to me to be known the persons executed the foregoing bond, and personally acknowledged that they did execute the same; and the said R. R. Griffith and R. R. Three, being duly sworn, severally say, each for himself, that he is a resident and freeholder in said county, and worth double the amount of the foregoing bond, exclusive of property exemptions from executions, and over and above all liabilities.

S. T. PETTY,
Clerk Superior Court, Cha'ham County.

5 *Summons.*

Superior court, New Hanover County.

FREDERICK J. SWANN, ASA SWANN, WIFE, ET al., plaintiffs,
against
GEORGE MYERS, DEFENDANT.
} Summons.

State of North Carolina to the sheriff of New Hanover County, greeting:

You are hereby commanded to summons George Myers to appear at the next term of said court, to be held at the court-house in Wilmington, on the eighth Monday after the fourth Monday in February, 1873, to answer the complaint of said plaintiffs.

If the defendant shall fail to appear at that time, the plaintiff will apply for the relief demanded in the complaint, together with the costs of this action.

Of this summons make due return to the clerk of said court for the county of New Hanover.

Given under my hand and seal of said court this 9th day of April, 1873.

J. C. MANN,
Clerk of said Court.
CANADAY, *D'p'y.*

(Endorsed:)

To hand April 9th, 1873. George Myers is not to be found in my county. The copy of this summons for George Myers was left at his store in the hands of R. C. Myers.

A. R. BLACK, *Sheriff.*

6 *Summons.*

Superior court, New Hanover County.

FREDERICK J. SWANN, ASA SWANN, WIFE, AND others, plaintiffs,
against
GEORGE MYERS, DEFENDANT.
}

The State of North Carolina to the sheriff of New Hanover County, greeting:

You are hereby commanded to summons George Myers to appear at the next term of said court, to be held at the court-house, in Wilmington, on the fourth Monday in June, 1873, to answer the complaint of the said plaintiffs.

If the defendants shall fail to appear at that time, the plaintiffs will apply for the relief demanded in the complaint, together the costs of this action.

Of this summons make due return to the clerk of said court of the county of New Hanover.

Given under my hand and seal of said court this 23d day of May, 1873.

J. C. MANN,
Clerk of said Court.

(Endorsed as follows, viz:)

To hand. Service of copies of summons and complaint accepted as of June term, A. D. 1873.

EMPIE & POISSON,
Att'ys for Defendant.

7 *First Complaint.*

In the superior court, spring term, 1873.

STATE OF NORTH CAROLINA,
New Hanover County:

FREDERICK J. SWANN, ALEXANDER D. WADDELL, and his wife Lucy; Frederick W. Swann, and his wife Rebecca; Ann Swann, and Arthur J. Hill, and his wife Mary, plaintiffs,
against
GEORGE MYERS, DEFENDANT.

The plaintiffs above named complain and allege:

1. That Alice Heron, of Wilmington, North Carolina, on the 2d day of May, A. D. 1811, made her last will and testament, duly executed, to pass real estate, and appointed as executors thereof John Waddell and John R. London, and afterwards died in the year 1813, and thereupon her said will was duly proved in the court of pleas and quarter sessions for New Hanover County, by John R. London, who alone qualified as executor to said will and took upon himself the burden of its execution.

2. That in and by her said will the testatrix in one clause thereof devised as follows: "I give and devise to my executors, hereinafter appointed, all of that tract of land lying between the southern boundary of Wilmington and Greenfield's plantation; also my land lying on or near Long Creek, in the county of New Hanover, to be sold by my executors, or the survivor, or the executor of such survivor, and the money arising from the sale of said tract or tracts; 1st, after deducting my legacies to Mary and William McKenzie, to be loaned upon interest until it shall amount to fifteen hundred dollars, and then such sum to be ex-
8 pended by my executors, or the executor of such survivor, in the improvement of my lots hereinafter devised, in trust, to the use and benefit of my granddaughter, Frances Swann. I give and devise all the residue of my real estate, of whatever name and kind, to John Waddell and John R. London, and the survivor, and the executor of such survivor, to the use of said John Waddell and John R. London, and the survivor and the executor of such survivor, in trust and confidence for the several interests and purposes, provisions, and limitations hereinafter *ex*expressed and declared, that is to say, to the separate use and behoof of said Frances Swann, for and during her life, and after her death in trust as aforesaid to the use of such child or children as may be alive at her death, or in case my granddaughter Frances demise without children or child, but leaving the issue of child or children, then to the issues of child or children last-mentioned, provided, however, that at the death of my granddaughter Frances, neither her issue, or the child or children of such issue shall be at the age of twenty-

one years; or after death of my granddaughter none of her issue, or the children of her issue shall arrive to the year of twenty-one years, then, and then only, to the use of those who would have inherited my estate had Frances died without issue, or children of such issue in my lifetime."

8. That said testatrix in a subsequent clause of her said will devised as follows: "And it is my will that the trustees aforesaid, and the
9 survivor, and the executors of the survivor, in the soundness of their discretion, may join with the cestui que use or guardian of cestui que, use in making any conveyances of the above property settled in trust as aforesaid as to them may seem proper."

That these are the only clauses in the said will devising and limiting the real estate, as will appear by reference to said will, a copy of which will be filed when required.

4. That said John R. London survived the said John Waddell, and afterwards departed this life, having first duly made his last will and testament, in which he appointed William C. Lord and Marsden Campbell his executors, who duly proved the said will in the court of pleas and quarter sessions of the county of New Hanover, and qualified thereto, taking upon themselves the burden of the execution thereof.

5. That on the 12th day of February, A. D. 1836, the said William C. Lord and Marsden Campbell, executors of the said John R. London, and John Swann and the said Frances Swann, his wife, executed a deed intending to convey, and purporting to convey to one Erastus Buck and his heirs a certain parcel of land lying in the city of Wilmington, and known in the plan of said town as lot No. 12, begin'ing at the southwest corner of an alley on Front street, running thence south along Front street seventy-three (73) feet to the northwest corner of lot B, No. 17; thence east, towards Second street, along the northern line of said lot No. 17, three hundred and thirty feet (330), to Second street; thence north,
10 along the line of Second street, sixty-six (66) feet, to the southeast corner of said alley; thence west, along the southern line of said alley, to the beginning, for and in consideration of the sum of two thousand dollars to them in hand paid by the said Buck; that said deed recited the provisions of the said will, as in this complaint above stated and expressed, that the said William C. Lord and Marsden Campbell, as executors of John R. London, the surviving executor and trustee, believed it to be advantageous to the interest of the *of the* cestui que use, Frances Swann, to make and execute said conveyance for the price aforesaid; that the said deed was executed under the hand and seal of William C. Lord as one of the executors aforesaid, and purported to be executed under the hand and seal of Marsden Campbell, the other of said executors, by William C. Lord, attorney, though it does not appear, except in that way, that he had any power of attorney. The said deed was also executed under the respective hands and seals of the said John Swann and his wife Frances, and it was proved and registered in the books of the register of deeds of the county of New Hanover, without any privy examination of the said Frances, wife of the said John, having been taken by Thomas Settle, then one of the judges of the superior court of law and equity of the State of North Carolina, before whom the acknowledgment was made, and who made the order of registration.

11 6. That the said Frances Swann continued to live until the year

1871, when she died, leaving at the time of her death the plaintiffs Frederick J. Swann, Lucy, who is the wife of Alexander D. Waddell, Rebecca, who is the wife of Frederick W. Swann, Ann Swann, and Mary, who is the wife of Arthur J. Hill, and these are the only children of Frances Swann, the grand-daughter of the testatrix, Alice Heron, who were living at the death of their mother, and who claim the real estate which are by the provisions of the said will given to their mother for life, and then to them after her death as is above set forth in this complaint.

7. That the plaintiffs are the owners in fee-simple as tenants in common of the store-house and lot now in the possession of the defendant; that said store-house and lot are part of the parcel of land mentioned and described in the deed of conveyance above-mentioned from the said William C. Lord and Marsden Campbell, executors and trustees as aforesaid, and the said John Swann and his wife Frances, to the said Erastus Buck, and the said defendant claims the same under a title derived from said Buck.

8. That the defendant withholds the possession from the plaintiffs. whereupon the plaintiffs demand:

1. Judgment for the possession of the said premises.
2. For five thousand dollars damages for withholding the same.

M. Q. WADDELL &
WILLIAM H. BATTLE & SONS,
Attorneys for Plaintiffs.

12 STATE OF NORTH CAROLINA,
New Hanover County:

Arthur J. Hill, one of the plaintiffs above named, being duly sworn by me, H. E. Scott, a justice of the peace in and for said county of New Hanover, and State aforesaid, says that the foregoing complaint is true to his own knowledge except to those matters therein stated on information and belief of the plaintiffs, and as to those matters he believes them to be true.

A. J. HILL.

Sworn to and subscribed before me this 17th of April, A. D. 1873.
H. E. SCOTT, *J. P.*

NORTH CAROLINA,
Moore County:

F. W. SWANN, A. D. WADDELL, AND OTHERS,
vs.
GEORGE MYERS.

This day, before A. H. McNeill, clerk of the superior court for the county of Moore, State of North Carolina, came F. W. Swann and A. D. Waddell, two of the plaintiffs in the above styled suit, and made oath that they cannot have a fair trial of said suit now pending in the superior court of the county of New Hanover, State aforesaid, because the suit involves the title to a large amount of real estate situate in the city of Wilmington, county of New Hanover, and the defendant and many other
13 persons interested in that question are men of wealth and influence, and that influence has been, and the plaintiffs declare will continue to be, used to the prejudice of the rights of the plaintiffs, so that they can-

not have a fair trial in the said county of New Hanover. The plaintiffs therefore pray that the said suit may be removed to some adjoining county for trial.

F. W. SWANN.
A. D. WADDELL.

Sworn to and subscribed before me this April 23d day, 1875.
JOHN WALKER, *J. P.*

NORTH CAROLINA,
Moore County:

I, J. H. McNeill, clerk of the superior court for said county, do hereby certify that John A. Walker, whose genuine signature appears to the foregoing affidavits of Swan and Waddell, is an acting justice of the peace, duly commissioned and qualified, and all his official acts as such are entitled to full faith and credit.

Given under my hand and seal of office this 24th day of April, A. D. 1875.

A. H. McNEILL, *C. S. C.*

14 Superior court, June term, 1875.

STATE OF NORTH CAROLINA,
New Hanover County:

FREDERICK J. SWANN, ALEXANDER D. WADDELL and his wife, Lucy, Frederick W. Swann and his wife Rebecca, Ann Swan, and Arthur J. Hill and his wife Mary, plaintiffs,
against
GEORGE MYERS, DEFENDANT.

On motion of the attorneys of the plaintiffs, made on the affidavit of F. W. Swann and A. D. Waddell, filed in this cause, it is ordered by the court that this cause be removed for trial to the county of Columbus, and set for trial on Friday of the first week of the spring term, 1876, of the superior court of said county, The place and time herein fixed for the trial of said cause is consented to by all the parties to this action.

ALLMAND A. McKOY,
Judge Presiding.

Superior court.

STATE OF NORTH CAROLINA,
New Hanover County:

15 I, James Heaton, clerk of the superior court of New Hanover County aforesaid, do hereby certify that the foregoing is a true and perfect transcript of all the papers in the case Frederick J. Swann & others against George Myers, number 1402, New Hanover County, trial docket. In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office, in Wilmington, this 10th day of March, A. D. 1876.

JAMES HEATON,
Clerk of Superior Court, New Hanover County.
J. BISHOP, *Deputy Clerk.*

NORTH CAROLINA:

Be it remembered that a superior court of law is this day opened and held for the county of Columbus at the court-house in Whiteville, it being the fourth Monday after the second Monday of February, A. D. 1876, and the 13th day of March in said year. Present and presiding, the Hon'l Allmond A. McKoy, judge of the 4th judicial district of North Carolina.

F. J. SWANN AND OTHERS
vs.
GEORGE MYERS.

The following jurors are sworn and empanneled to try the issue, viz: Robert Powers, M. D. Bullard, William Nance, J. H. Stanley, Anderson Thompson, E. H. Thompson, A. M. Worley, Wm. McD. Maultsby, E. D. Williams, J. M. Shipman, J. M. Holton, and J. M. Harrelson, who say they find all the issues in favor of the defendant, and that he
16 have judgment for his costs. Rule for new trial. Rule discharged.
From which judgment the plaintiffs pray an appeal to the supreme court, which is granted upon entering into bond in the sum of thirty-five dollars.

Notice waived and bond filed.

NORTH CAROLINA:

Be it remembered that a superior court of law is this day opened and held for the county of Columbus at the court-house in Whiteville, it being the second Monday after the fourth Monday of August, A. D. 1876, and the 11th day of September in said year. Present and presiding the Hon. Allmond A. McKoy, judge of the fourth judicial district of North Carolina.

SWANN AND OTHERS
vs.
GEORGE MYERS.

For want of transcript from supreme court this cause is continued without prejudice to either party.

NORTH CAROLINA:

Be it remembered that a superior court of law is this day opened and held for the county of Columbus at the court-house in Whiteville, it being the second Monday after the fourth Monday of February, A. D. 1877, and 13th day of March in said year. Present and presiding the Hon. Aug. S. Seymour, judge 4th district of North Carolina.

17 Spring term, 1877, superior court, Columbus County.

F. J. SWANN & OTHERS
vs.
GEORGE MYERS.

It is ordered that the plaintiffs have leave to amend the complaint gen-

erally within ninety days after this term, and that defendants have leave to withdraw the former answer and file a new one at the next term.

AUG. S. SEYMOUR,
Judge Presiding.

Amended complaint.

STATE OF NORTH CAROLINA,
Columbus County:

Superior court.

FREDERICK J. SWANN, ALEXANDER D. WADDELL and his wife Lucy, Frederick W. Swann, F. J. Swann, jr., by his next friend, the said Frederick W. Swann, Ann Swann, and Mary Hill, plaintiffs,

against

GEORGE MYERS, WILLIAM S. LONDON, HENRY A. London, jr., Frank London, Fanny London, Ann M. Zimmerman, John R. London, Fred. H. London, Snowden and Eliza Snowden his wife, William L. De Rossett, Thomas C. De Rossett, Armand J. De Rossett, jr., M. J. De Rossett, Catharine G. Meares, Graham Daves and Alice his wife, Charles D. Myers and Eliza his wife, and Gabriella de Gordin De Rossett, 18 Robert Cowan De Rossett and Kate De Rossett, infants under the age of 21 years, and Frederick J. Lord, defendants.

The plaintiffs above named by their amended complaint complain and allege:

1st. That Alice Heron, of Wilmington, North Carolina, on the 2nd day of May, A. D. 1811, made her last will and testament, duly executed, to pass real estate, and appointed as executors thereof John Waddell and John R. London, and afterwards died in the year 1813; and thereupon her said will was duly proved in the court of pleas and quarter sessions of New Hanover County by John R. London, who alone qualified as executor to said will, and took upon himself the burden of its execution.

2d. That in and by her said will the testatrix in one clause thereof devised as follows: "I give and devise to my executors hereinafter appointed all that tract of land lying between the southern boundary of Wilmington and the Greenfield plantation, also all my land lying near or on Long Creek, in the county of New Hanover, to be sold by my executors or the survivor or the executors of such survivor, and the money arising from the sale of said tract or tracts, first deducting my legacies to William & Mary McKenzie, to be loaned upon interest until it shall amount to fifteen hundred dollars, and then such sum to be expended by my executors or the survivor or the executor of such survivor in the improvement of my lots hereinafter devised in trust to the use and benefit of my granddaughter, Frances Swann. I give and devise all the residue of my real estate of

whatever nature and kind to John Waddell and John R. London, and the survivor and the executor of such survivor to the use of the said John Waddell and John R. London, and to the executor of such sur-
19 vivor in trust and confidence for the several interests and purposes, provisions and limitations hereinafter expressed and declared; that is to say, to the separate use and behoof of the said Frances Swann for and during her life, and after her death, in trust as aforesaid, to the use of such child or children as may be alive at her death; or, in case my granddaughter Frances's demise without children or child, but leaving the issue of such child or children, then to the use of such child or children last mentioned; provided, however, that if at the death of my granddaughter, Frances, neither her issue or the child or children shall be at the age of twenty-one years, or after the death of granddaughter none of her issue or the children of her issue shall arrive to the years of twenty-one, then and then only to the use of those who would have inherited my estate had Frances died without issue or children of such issue in my life-time."

3d. That the testatrix, in a subsequent clause of her said will, devised as follows: "And it is my will that the trustees aforesaid and the survivor and the executor of the survivor, in the soundness of their discretion, may join with the cestui que use or guardian of cestui que use in making any conveyance of the above property settled in trust as aforesaid, as may to them seem proper." That these are the only clauses in the said will devising and limiting the real as will *as will* appear by reference to said will, a copy of which will be filed when required.

4th. That the said John R. London survived the said John Wad-
20 dell, and afterwards departed this life, having first duly made his last will and testament, in which he appointed William C. Lord and Marsden Campbell his executors, who duly proved said will in the court of pleas and quarter sessions in the county of New Hanover, and qualified thereto, taking upon themselves the burden of the execution thereof.

5th. That on the 12th day of February, A. D. 1836, the said William C. Lord and Marsden Campbell, as executors of the said John R. London, and John Swann and the said Frances Swann, his wife, executed a deed intending to convey and purporting to convey to one Erastus Buck and his heirs a certain parcel of land lying in the city of Wilmington and known in the plan of said town as lot No. 12, beginning at the southwest corner of an alley on Front street and running thence south along Front street seventy-three (73) feet to the northwest corner of lot B, No. 17; thence east towards Second street along the northern line of said lot No. 17 three hundred & thirty (330) feet to Second street sixty-six (66) feet to the southeast corner of said alley; thence west along the southern line of said alley to the beginning, for and in consideration of the sum of two thousand dollars to them in hand paid by the said Buck. That said deed recited the provisions of said will as in this complaint above stated and expressed, that the said William C. Lord and Marsden Campbell, as executors of John R. London, the surviving executor and trustee, believed it to be advantageous to the interest of the cestui que use, Frances
21 Swann, to make and execute said conveyance for the price aforesaid. That the said deed was executed under the hands and seals of William C. Lord, as one of the executors aforesaid, and purported to be executed under the hand and seal of Marsden Campbell, the other of said

executors, by William C. Lord, attorney, though it does not appear except in that way that he had any power of attorney. And the plaintiffs allege that the said William C. Lord did not have any power of attorney or any other authority whatever from the said Marsden Campbell to sell said premises or to execute said deed for and in his, the said Campbell's, name. The said deed was also executed under the respective hands and seals of the said John Swann and his wife Frances, and it was proved and registered in the books of the register of the county of New Hanover, the privy examination of the Frances, wife of the said John Swann, having been taken by Thomas Settle, then one of the judges of the superior courts of law and courts of equity of the State of North Carolina, before whom the acknowledgment of the parties was made and who made the order of registration.

6th. That the said Marsden Campbell removed from this State to the State of Louisiana in the year 1834, and afterwards died intestate in said State of Louisiana in the year 1844.

7th. That William C. Lord survived the said Marsden Campbell and died intestate in the year 1847, and his heirs at law are the defendants, Frederick J. Lord, his son, and Ann M. Zimmerman, widow of B.
22 Zimmerman, Fanny London, William S. London, Henry A. London, jr., and Frank London, John R. London, Fred. H. London, and Eliza Snowden, wife of Snowden, who are the children of Sally London, a deceased daughter of said William C. Lord, and the defendants William L. De Rossett, Thomas C. De Rossett, Armand J. De Rossett, jr., M. J. De Rossett, Alice Davis, wife of Graham Davis, Eliza Myers, wife of Charles D. Myers, and Catharine G. Meares, wife of Gaston Meares, deceased, who are the children of Eliza De Rossett, a deceased daughter of said William C. Lord and Gabriella de Gordin De Rossett, Robert Cowan De Rossett, and Kate De Rossett, who are the grandchildren of the said Eliza De Rossett, and are the children of Louis H. De Rossett, dec.

8th. That the said Gabriella de Gordin De Rossett, Robert Cowan De Rossett, and Kate De Rossett are infants under the age of twenty-one years, and have no general or testamentary guardian, as the plaintiffs have been informed and believe.

9th. That the heirs at law of Alice Heron are the plaintiffs Frederick J. Swann, Ann Mary Hill, Lucy Waddell, and F. J. Swann, jr., who are the issue of the said Frances Swann and the issue of Mary McKenzie, deceased, if she have any issue now in being.

10th. That William McKenzie and Mary McKenzie, the only children and heirs at law of the above-named Mary McKenzie, removed from this State to the State of South Carolina more than forty years ago,
23 and the plaintiffs after the most diligent enquiry have not been able to ascertain whether they are living or dead, or whether they or either of them have heirs or issue living or not, nothing having been heard from said William and Mary McKenzie forty (?) thirty years or more.

11th. That Frederick J. Swann, Rebecca M. Swann, the wife of Frederick W. Swann, Lucy Waddell, the wife of A. D. Waddell, Ann Swann, and Mary Hill, the wife of Arthur J. Hill, are the children of the said Frances Swann, who were living at the time of her death, and the said Frances Swann and Mary McKenzie were the only issue and heirs at law of the said Alice Heron at her death.

12th. That since the commencement of this action the said Arthur J. Hill has died, leaving him surviving his widow, the said Mary Hill; and the said Rebecca M. Swann, the wife of Frederick W. Swann, has also died intestate, leaving the said F. J. Swann, jr., who is an infant under twenty-one years of age and without guardian, her only issue and heir at law, and he sues herein by his father and next friend, Frederick W. Swann.

13th. That the said Frances Swann survived her husband, John Swann, and continued to live until the year, 1871, when she died, and that the children of said Frances Swann living at the time of her death are the said Frederick J. Swann, who was born the 15th day of October, in the year 1823; Lucy Waddell, the wife of Alexander D. Waddell, who was born the 25th day of January, in the year 1831; Rebecca M., the
24 wife Frederick W. Swann, was born the 20th of September, in the year 1829; Ann Swann, who was born the 10th day of September, 1818; Mary Hill, the wife of Arthur J. Hill, was born the 7th day of January in the year 1811, and that these are the only children of the said Frances Swann, the granddaughter of the testatrix, Alice Heron, who were living at the time of the death of their mother. That since the commencement of this action the said Arthur J. Hill has died, leaving him surviving his widow, the said Mary Hill, and the said Rebecca M. Swann has also died intestate, leaving her surviving her husband, the said Frederick W. Swann, and F. J. Swann, jr., their child, he being their only issue and heir at law; and the said Frederick J. Swann, Lucy Waddell, the wife of Alexander D. Waddell, Frederick W. Swann, the husband, and F. J. Swann, jr., the son of Rebecca M. Swann, Ann Swann, and Mary Hill, claim the real estate which is by the provisions of the said will devised to the said Frances Swann for her life and then to her said children after her death, as is above set forth in this complaint.

14th. That the plaintiffs are the owners in fee-simple as tenants in common of the storehouse and lot now in the possession of the defendant, George Myers; that said storehouse and lot are a part of the parcel of land mentioned and described in the deed of conveyance above mentioned purporting to be from the said William C. Lord and Marsden Campbell,
executors and trustees as aforesaid, and the said John Swann and
25 his wife Frances to the said Erastus Buck, and the said defendant George Myers claims the same under a title derived from the said Erastus Buck.

15th. That the plaintiffs are advised and allege that the heirs at law of the said William C. Lord, above-mentioned, are necessary parties to a complete determination of the questions involved in this action; that at spring term, A. D. 1877, of this court the plaintiffs obtained the leave of the court to make them parties thereto, and since that time have requested them to become parties plaintiff, with which request they have refused to comply, and for that reason the plaintiffs have caused them to be made defendants.

16th. That the defendant, George Myers, wrongfully withholds the possession of said premises from the plaintiffs, wherefore the plaintiffs demand judgment—

1st. For the possession of said premises.

2d. For the recovery from the defendant, George Myers, of eight thousand dollars damages for withholding the same.

3d. For a conveyance to the plaintiffs from the said heirs at law of William C. Lord, of any estate or interest which they may have in the premises.

4th. For the costs of this action.

5th. For such other and further relief as the nature and circumstances of the case shall require and to this honorable court shall seem meet and proper.

WM. H. BATTLE & SON,
M. Q. WADDELL,
W. S. & J. D. DEVANE,
Attorneys for Plaintiffs.

26 *Affidavit.*

STATE OF NORTH CAROLINA,
Moore County:

Office of clerk of the superior court.

A. D. Waddell and F. J. Swann, two of the above-named plaintiffs, being by me first duly sworn, depose and make oath that they have read the foregoing amended complaint and know the contents thereof; and that the same is true of their own knowledge, except as to those matters therein stated on information and belief, and as to those matters they believe it to be true.

A. D. WADDELL.
F. J. SWANN.

Subscribed and sworn to before me this 22d day of May, 1877.
A. H. McNEILL, *C. S. C.*

Summons.

Superior court, Columbus County.

F. J. SWANN, ALEXANDER D. WADDELL & his wife, Lucy, Frederick W. Swann, F. J. Swann, jr., by his next friend the said Frederick W. Swann, Ann Swann, and Mary Hill, plaintiffs,
against
GEORGE MYERS, WILLIAM S. LONDON, HENRY A. Lond', jr., Frank London, Fanny London & others.

State of North Carolina to the sheriff of Chatham County, greeting:

You are hereby commanded to summon William S. London, Henry A. London, jr., Frank London, Fanny London, and Ann M. Zimmerman, defendants in the above action, to appear at the next term of said court to be held at the court-house, in Whiteville, on the fourth Monday
27 after the second Monday of August, 1877, to answer the complaint of the said plaintiffs. If the defendants shall fail to appear at that

time the plaintiffs will apply for the relief demanded in the complaint, together with the costs of this action. Of this summons make due return to the clerk of said court for the county of Columbus. Given under my hand and seal of said court this 4th day of June, 1877.

[SEAL.] W. M. BALDWIN,
Clerk of said Court.

(Endorsed:) To hand June 10th, 1877. Served by delivering a copy of this summons to Fanny London, W. S. & Frank London, also Mrs. Zimmerman and H. A. London, jr.

J. W. TAYLOR,
Sheriff of Chatham.

Summons.

Superior court, Columbus County.

FREDERICK J. SWANN, ALEXANDER D. WADdell and his wife, Lucy, Frederick W. Swann, F. J. Swann, jr., by his next friend the said Frederick W. Swann; Ann Swann, and Mary Hill, plaintiffs,
against
GEORGE MYERS, WILLIAM S. LONDON, HENRY A. London, jr., Frank London, Fanny London, and others.

State of North Carolina to the sheriff of New Hanover County, greeting:

You are hereby commanded to summons Charles D. Myers and Eliza Myers, his wife, Frederick J. Lord, William L. De Rossett, M.
28 J. De Rossett, Armand J. De Rossett, jr., Thomas C. De Rossett, Graham Davis and Alice Davis, his wife, and Catharine G. Mears, defendants in the above action, to appear at the next term of said court to be held at the court-house in Whiteville, on the fourth Monday after the second Monday of August, 1877, to answer the complaint of the said plaintiffs. If the defendants shall fail to appear at that time the plaintiffs will apply for the relief demanded in the complaint, together with the costs of this action. Of this summons make due return to the clerk of said court for the county of Columbus. Given under my hand seal of said court this 4th day of June, 1877.

[SEAL.] W. M. BALDWIN,
Clerk of said Court.

Endorsed as follows: To hand June 5th, 1877. Executed on all except Catharine D. Meares, who is not to be found in New Hanover County. July 20, 1877.

S. H. MANNING, *Sheriff.*

Summons.

Superior court, Columbus County.

FREDERICK J. SWANN, ALEXANDER D. WADDELL and his wife, Lucy, Frederick W. Swann, F. J. Swann, jr., by his next friend the said Frederick W. Swann; Ann Swann, & Mary Hill, plaintiffs.
against
GEORGE MYERS, WILLIAM S. LONDON, HENRY A. London, jr., Frank London, Fanny London, & others, defendants.

State of North Carolina to the sheriff of Henderson County, greeting:

29 You are hereby commanded to summon Catharine G. Meares, one of the defendants in the above action, to appear at the next term of said court to be held at the court-house in Whiteville, on the fourth Monday after the second Monday in August, 1877, to answer the complaint of said plaintiffs. If the defendants shall [fail] to appear at that time the plaintiffs will apply for the relief demanded in the complaint, together with the costs of this action. Of this summons make due return to the clerk of said court for the county of Columbus.

Given under my hand and seal of said court this 4th day of June, 1877.

W. M. BALDWIN,
Clerk of said Court.

(Endorsed as follows:) Due search made. Not to be found in my county.

J. WILLIAMS, *Sheriff.*
HENDERSON.

Answer.

STATE OF NORTH CAROLINA:

Superior court of law, Columbus County.

FREDERICK J. SWANN, ALEXANDER D. WADDELL and his wife, Lucy, Frederick W. Swann, F. J. Swann, jr., by his next friend Frederick W. Swann; Ann Swann, & Mary Hill, plaintiffs,
against
GEORGE MYERS, WILLIAM S. LONDON, HENRY A. London, jr., Frank London, Fanny London, Ann M. Zimmerman, John R. London, Fred. A. London, William L. De Rossett, Thomas C. De Rossett, Armand J. De Rossett, jr., M. J. De Rossett, Catharine G. Meares, Graham Davis and
30 Alice, his wife, Charles D. Myers and Eliza, his wife, and Gabriella de Gordin De Rossett, Robert Cowan De Rossett, and Kate De Rossett, infants under the age of 21 years, Snowden and Eliza Snowden, his wife, and Frederick J. Lord, defendants.

The defendant George Myers ans'ers to the amended complaint of the plaintiffs—

First. For a first defence, that all the allegations of fact contained in the first, second, third, and fourth articles of the complaint are admitted to be true.

2. That all the allegations of fact contained in the fifth article of the complaint are admitted to be true, except the allegation that William C. Lord had no power of attorney, or any other authority whatever, from Marsden Campbell to sell the premises and to execute the deed in the complaint mentioned, in said Campbell's name, which the defendant denies, and, to the contrary thereof, avers that the said William C. Lord, at the time of the execution of said deed, had a power of attorney, under the hand and seal of said Marsden Campbell, authorizing and empowering him to sell the said land and to make the said deed, as the attorney in fact of the said Campbell, and in his name.

3. It is admitted that Marsden Campbell removed from this State to Louisiana in the year 1834, and that he died intestate, but not in the year 1844, as alleged. This defendant is informed and believes, and therefore he avers, that the said Campbell died on the 18th day of October, 1841.

4. That the allegation of the seventh and eighth articles of the complaint are admitted to be true.

5. This defendant has no knowledge or information sufficient to
31 form a belief as to whether or not the persons named in the ninth article of the complaint are the heirs-at-law of Alice Heron.

6. This defendant has no knowledge or information sufficient to form a belief as to any of the matters of fact alleged in the tenth article of the complaint.

7. It is admitted that Frederick J. Swann, Rebecca W. Swann, Lucy Waddell, Ann Swann, and Mary Hill are the children of Frances Swann, who were living at the time of her death. But this defendant hath no knowledge or information sufficient to form a belief as to whether or not the said Frances Swann and William & Mary McKenzie were the only issue and heirs at law of Alice Heron at her death.

8. The allegations of the 12th article of the complaint are admitted to be true.

9. This defendant, admitting all the other allegations of fact contained in the 13th article of the complaint, alleges that he has no knowledge or information sufficient to form a belief [as] to whether or not the dates of the respective births of Frederick J. Swann, Lucy Waddell, Rebecca M. Swann, Ann Swann, and Mary Hill are truly and correctly stated therein, and prays that plaintiffs may be held to strict proof thereof.

10. This defendant admits that he is in possession of, and to so much, and only so much of, the land described in the deed from William C. Lord and Marsden Campbell, executors of John R. London, and John Swann and wife to Erastus Buck, as is embraced in the following boundaries,
to wit: Beginning in the eastern line of Front street, between
32 Market street and Dock street, at the southern line of an alley which runs from Front to Second streets; running thence with said line of Front street southwardly about forty-three feet to Levi A. Hart's line; thence with Hart's line eastwardly ninety-eight feet; thence with Hart's other line northwardly thirty-four feet to the southern line of said alley; thence with the said line of said alley westwardly ninety-eight feet to the beginning; and this defendant disclaims title to all the residue of

the land in the said deed described, and avers that he is not now nor never has been in the possession of any of the residue of said land.

11. That this defendant does not wrongfully withhold the possession of said land from the plaintiffs, but holds the same rightfully and by good title.

Second. For a second defense:

1. That this defendant purchased the land of which he has above admitted himself to be in possession from one Ronald McDougall at and for the price of $5,500, which was its full and fair value; and that he paid the said purchase-money and took a deed from the said McDougall on the 7th day of July, 1853, and that at the time of paying said purchase-money and the taking said deed, and even up to the commencement of this action, he had no knowledge, notice, or information whatsoever of any right, title, or claim to the said land on the part of the plaintiffs, or any other person except the said McDougall.

Third. For a third defense:

33 1. That the right of action in the complaint alleged did not accrue to the plaintiffs within seven years before the commencement of this action.

Fourth. For a further defence:

That the defendant and those under whom he claims have had and held continuous, open, and notorious adverse possession of said land ever since the year 1843 under a regular and connected chain of conveyances, and that all and every right of entry and right of action whatsoever of the plaintiffs was by reason thereof, and before the commencement of this action, *tolled precluded* [totally precluded] and forever barred.

Fifth. For a fifth defence:

1. That *that* the failure of the said Marsden Campbell to join with the said William C. Lord and John Swann and wife, Frances, in the execution of said deed to Erastus Buck, if any such failure there was (which this defendant denies) made only a case of a defective execution of the power of sale and conveyance contained in the said will of Alice Heron; and this court will aid, remedy, and complete the said defective execution in favor of this defendant who is purchaser for full value, and without notice.

Sixth. For a sixth defence:

That the defendant, and those under whom he claims, while holding the said lands under a title which he and they believe to be good, have made permanent improvements thereon to the value of thirty-six hundred

34 dollars, and at the time of making the same he and they had no notice, knowledge, or information of the title under which the plaintiffs claim. And the defendant prays he may be allowed for the said improvements over and above the value of the use and occupation of the said land.

M. LONDON,
GEO. DAVIS,
Def's Att'ys.

George Myers, being duly sworn, makes oath that the foregoing answer is true to his knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

GEORGE MYERS.

Subscribed and sworn this 8th day of September, 1877, before me.
[SEAL.] LAWSON E. RICE,
Notary Public.

STATE OF NORTH CAROLINA,
County of New Hanover:

George Myers being duly sworn, make' oath and says that the foregoing answer as amended in the sixth article thereof is true to his knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

GEO. MYERS.

Sworn and subscribed before me this 12th March, 1878.
[SEAL.] JNO. D. TAYLOR,
Clerk Superior Court New Hanover County.

35 Superior court of law for Columbus County, fall term, 1877.

Present and presiding the Hon. W. A. Moore, judge.

FREDERICK J. SWANN & OTHERS
against
GEORGE MYERS AND OTHERS.

Cause continued.

Superior court, fall term, 1877.

NORTH CAROLINA,
Columbus County:

FREDERICK J. SWANN & OTHERS
vs.
GEORGE MYERS & OTHERS.

Order in this case. Defendant to amend the 6th article of his answer.

On motion of Thomas H. Sutton, one of the plaintiffs' counsel, it is ordered that the defendant, Myers, amend the 6th article of defenc' set up in his answer, and specifically set forth what claim he makes for permenant improvements. That *that* he serve a copy thereof on D. J. Devane, esq., one of the plaintiffs' counsel, by or before the 1st day of November, 1877. And the plaintiffs have leave to reply to amended answer if they see fit, and if they do so reply to serve a copy on one of the defendants' counsel in the city of Wilmington, N. C., by or before the 1st day of December, 1877.

W. A. MOORE, *Judge, &c.*

36 *Petition for transfer of suit to federal court.*

In the superior court of Columbus County, State of North Carolina.

FREDERICK J. SWANN, ALEXANDER D. WADDELL and wife Lucy, Frederick W. Swann and wife Rebecca, Ann Swann, and Arthur J. Hill and wife Mary,
vs.
GEORGE MYERS, F. J. LORD, AND OTHERS.

To the honorable the judge of the superior court of Columbus County, State of North Carolina:

Your petitioner, George Myers, respectfully shows that he is defendant in the foregoing entitled suit, and that the same was commenced against him on or about the 19th day of May, 1873, in the superior of New Hanover County, and removed by the plaintiffs to the superior court of Columbus County, and a verdict and judgment was rendered in favor of your petitioner, and plaintiffs appealed to the supreme court of the State, and the judgment of the said superior court was reversed by the supreme court and a new trial ordered. Your petitioner further shows that there is and was at the time said suit was brought a controversy therein between your petitioner and the said plaintiffs, who are citizens of North Carolina; that your petitioner then was and still is a citizen of the State of New York, and resident thereof, though your petitioner is now and has been for some months abiding in Wilmington *in said in this State* [in this said State] for a temporary purpose only, and has not abandoned his citizenship or
37 residence as a citizen of New York, and has no intention of becoming a citizen or resident of North Carolina; that said action was brought by the said plaintiffs for the purpose of recovering the possession of a certain lot of land in the city of Wilmington, upon which is situated a brick store-house, and to recover damages for a sum exceeding five thousand dollars, and that the matter in dispute in this suit exceeds the sum of five hundred dollars, exclusive of cost. Your petitioner further represents that this suit is now pending for trial in this honorable court, and that your petitioner desires to remove the same into the circuit court for the eastern district of North Carolina in pursuance of the act of Congress in that behalf provided, to wit, Revised Statutes of the United States, section 639, subdivision 3. Your petitioner further says that he has filed the affidavit required by the statute in such cases, and offers herewith his bond, executed by Levi A. Hart, as security, in the penal sum of five hundred dollars, conditioned as by said act of Congress required.

Your petitioner therefore prays that said bond may be accepted as good as [and] sufficient, according to said act of Congress, and that the said suit may be removed into the next circuit court of the United States in and for the said eastern district of North Carolina, pursuant to the aforesaid act of Congress in such case made and provided, and that no further proceedings may be had thereon in this court, and your petitioner will ever pray, &c.

GEORGE DAVIS,
M. LONDON,
Attorneys for Petitioner.

38 STATE OF NORTH CAROLINA,
New Hanover County:

George Myers, being duly sworn, make' oath that the foregoing petition is true to his knowledge, except as to matters therein stated on information and belief, and as to those matters, he believes it to be true.

GEORGE MYERS.

Sworn to & subscribed before me this 11th day of March, 1878.
[SEAL.] JOHN D. TAYLOR,
Clerk Superior Court, New Hanover County.

Affidavit for removal.

In the superior court of Columbus County, State of North Carolina.

FREDERICK J. SWANN, ALEXANDER D. WADDELL and wife Lucy, Frederick W. Swann and wife Rebecca, Ann Swann, and Arthur J. Hill and wife Mary,
vs.
GEORGE MYERS, F. J. LORD, AND OTHERS. } Affidavit.

STATE OF NORTH CAROLINA,
County of New Hanover:

I, George Myers, being duly sworn, do say that I am one of the defendants in the above-entitled cause; that I have reason to believe, and do believe, that from prejudice and local influence, I will not be able to obtain justice in said State court.

Subscribed by the said George Myers in my presence, and by
39 him sworn to before me, at Wilmington, this 11th day of March, A. D. 1878.

GEORGE MYERS.

Sworn and subscribed before me this 11th day of March, 1878.
JNO. D. TAYLOR,
Clerk Superior Court, New Hanover County.

STATE OF NORTH CAROLINA,
Columbus County:

Superior court, spring term, 1878.

FREDERICK J. SWANN, ALEXANDER D. WADDELL and his wife Lucy, and others, plaintiffs,
against
GEORGE MYERS, F. J. LORD, AND OTHERS, DEFENDANTS.

George Myers, one of the above-named defendants, having, by his counsel, moved at the above-mentioned term of this court, under act of Congress, on the petition, affidavit, and bond of the said George Myers, filed in this cause, which bond is deemed by *by* the court to be sufficient, that the said action be removed from this court into the next circuit court of

the United States in and for the eastern district of North Carolina, and the said motion coming on to be heard, and being heard on the said petition and affidavits, and the pleadings in said action, and argument of counsel, and it appearing to the satisfaction of the court that all the plaintiffs and the defendants, except the defendant George Myers, are residents and citizens of the State of North Carolina, and are necessary parties in this cause; and it appearing to the satisfaction of the court that in this action there cannot be a final determination of this controversy, so
40 far as it concerns the defendant George Myers, without the presence of the other defendants in said action, as parties in the cause, which defendants have not joined with the said George Myers in his petition to remove said cause, nor asked for the same: It is therefore considered and adjudged by the court that the said motion for removal of said action be, and the same is hereby, denied and disallowed; and that the said cause is retained for trial in the superior court of Columbus County, in the State of North Carolina, from which judgment the defendant George Myers craves appeal to the supreme court of North Carolina. Appeal granted. Notice of appeal waived.

Appeal bond in the sum of fifty dollars, filed and adjudged sufficient.

M. L. EURE,
Judge Presiding.

Bond.

STATE OF NORTH CAROLINA:

Whereas at the superior court of Columbus County, at spring term, 1878, his honor M. L. Eure, judge presiding, in the case of F. J. Swann and others, plaintiffs, vs. George Myers and others, defendants, pending for trial in said court, George Myers, through his counsel, filed a petition for the removal of the cause to the circuit court of the United States, and filed his bond with security, and also an affidavit for the removal, as provided by law; and whereas his honor the presiding judge refused the motion to remove; and whereas his honor, upon motion of the said
41 George Myers' counsel, allowed said defendant to appeal to the supreme court from said order refusing said motion upon his entering into an undertaking in the sum of fifty dollars to pay the costs of the appellate court should judgment be rendered against him: Now, therefore, we, the undersigned, undertake that the said appel'ant shall pay all costs and damages that may be awarded against him on such appeal, not to exceed fifty dollars.

GEORGE MYERS.
LEVI A. HART.

Witness:
HENRY S.

Judgment.

STATE OF NORTH CAROLINA:

Supreme Court. June term, 1878. No. 94. Columbus County.

F. J. SWANN ET ALS.
vs.
GEORGE MYERS ET ALS.

This cause coming on to be argued upon the transcript of the record

from the superior court of Columbus County; upon consideration whereof this court is of the opinion that there is error in the record and proceedings of said superior court. It is therefore considered and adjudged by the court here that the opinion of the court as delivered by the honorable Will. B. Rodman, justice, be certified to the superior court to the
42 intent that further proceedings may be had according to law. And it is considered and adjudged further that the *the* defendants, the said George Myers and others, do recover from the plaintiffs, the said F. J. Swann, Alexander D. Waddell, Lucy Waddell, Frederick W. Swann, Ann Swann, and Mary Hill, the costs of the appeal in this court incurred, to wit, twenty-six $\frac{50}{100}$ dollars ($26.50), and let execution issue therefor.

A true copy.

Test:

WM. H. BAGLEY, *Clerk.*

STATE OF NORTH CAROLINA,
Columbus County:

Superior court. Fall term, 1878.

F. J. SWANN AND OTHERS, PLAINTIFFS,
against
GEORGE MYERS AND OTHERS, DEFENDANTS,

The supreme court of North Carolina having ordered the removal of the above case to the circuit court of the United States for the eastern district of North Carolina, and it appearing to the satisfaction of the court that the defendants, except George Myers, are merely nominal parties as trustees, upon whom notice had been served and a request made that they join as parties plaintiff, which they declined to do:

It is therefore ordered and adjudged that the case as it is now constituted be removed to the circuit court of the United States for the eastern district of North Carolina, to be held at Raleigh on the last Monday
43 in November next. The clerk of this court will make out a transcript of all the proceedings had in the above cause, and certify the same to the clerk of said court.

R. P. BUXTON,
Judge Presiding.

Bond for removal to United States court.

Know all men by these presents that we, George Myers, of the State of New York, as principal, and Levi A. Hart, of Wilmington, North Carolina, as surety, are hereby held and firmly bound unto Frederick J. Swann, Alexander D. Waddell and his wife Lucy, Frederick W. Swann and his wife Rebecca, Ann Swann, Arthur J. Hill and wife Mary, in the penal sum of five hundred dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

The condition of the above obligation is such that if the said George Myers shall enter and file, or cause to be entered and filed, in the next circuit (court) of the United States in and for the eastern district of North

Carolina, on the first day of its session, copies of all process, pleadings, depositions, and other proceedings in a certain suit or action now pending in the district (superior) court of the county of Columbus, and State of North Carolina, in which Frederick J. Swann, Alexander D. Waddell and wife, Ann Swann, and others are plaintiffs, and George Myers, F. J. Lord, and others are defendants, and shall do such other acts as by the
44 acts of Congress in that behalf are required to be done upon the removal of such suit from said State court into the said United States court, then this obligation to be void; otherwise of force.

Witness our hands and seals this 11th day of March, 1878.

GEO. MYERS. [SEAL.]
LEVI A. HART. [SEAL.]

STATE OF NORTH CAROLINA,
County of New Hanover:

I, Levi A. Hart, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of North Carolina, and a property holder therein; that I am worth (the) sum five hundred dollars over and above all my debts and liabilities, and exclusive of property by law exempt from execution; that I have property in the State of North Carolina liable to execution of the value of more than five hundred dollars.

Subscribed in my presence by Levi A. Hart, and by him sworn before me this 11th day of March, 1878.

[SEAL.] J. D. TAYLOR,
Clerk Superior Court of New Hanover County.

Commission to take depositions.

STATE OF NORTH CAROLINA:

To Charles E. Grose, esq'r, of the city of Hartford, and State of Connecticut:

We, having confidence in your prudence and fidelity, do hereby authorize and empower you to cause Silas Buck, a witness in behalf of
45 the defendant, to come before you, at such time and place as you shall appoint, and him to examine on oath concerning all such matters and things as he may know respecting a controversy now depending in the superior court of Columbus County, and State of North Carolina, wherein Frederick J. Swann, Alexander D. Waddell and wife Lucy, and others are plaintiffs, and George Myers, defendant, as well on the part of said defendant as the said plaintiffs, and his deposition to take in writing, under your hand and seal, and send the same to our superior court to be held for the county of Columbus, at the court-house in Whiteville, on the fourth Monday after the second Monday in February, A. D. 1876.

Witness William M. Baldwin, clerk of our said court, at office, the 23d day of February, A. D. 1876.

[SEAL.] W. M. BALDWIN,
Clerk Sup'r Court, Columbus County.

A.—*Deposition of Silas Buck.*

STATE OF CONNECTICUT,
County and City of Hartford:

By virtue of the annexed commission to me directed, and issuing from the superior court of Columbus County, in the State of North Carolina, in a certain civil action therein depending, wherein Frederick J. Swann, Alexander D. Waddell, wife Lucy, Frederick W. Swann and wife Rebecca, Ann Swann, Arthur J. Hill and wife Mary, are plaintiffs, and George Myers defendant, I, Charles E. Grose, the commissioner therein
46 named, on this Friday, the 10th day of March, 1876, did cause the witness SILAS BUCK to come before me at my office, No. 80 State street, in the city of Hartford and State of Connecticut, and the said witness being by me first duly sworn upon the Holy Evangelist of Almighty God to tell the truth, the whole truth, and nothing but the truth touching the matter in controversey in said action, did depose and say as follows, to wit:

In answer to the first interrogatory he said:

Ques. 1. What is your name, age, residence, and occupation?

Ans. 1. My name is Silas Buck; my age is fifty-seven years; my residence, 41 Grand st., in the city and county of Hartford and State of Connecticut; my occupation is that of carriage-maker.

To the second interrogatory he said:

Ques. 2. State whether you are any relative, and, if so, what relation, of Erastus Buck, who formerly did business in Wilmington, North Carolina.

Ans. 2. Said Erastus Buck was my father.

To the third interrogatory he said:

Ques. 3. Is said Buck living? If not, state when he died.

Ans. 3. Said Erastus Buck died in the month of August, 1839.

To the fourth interrogatory he said:

Ques. 4. State whether he left any children surviving; him if so, give the names of all of them.

Ans. 4. He left four children surviving him, to wit, Silas Buck, George M. Buck, Henry E. Buck, and Charlotte A. Buck. Charlotte A. Buck has since intermarried with Henry Dyer; all of said four children are still living.

47 To the fifth interrogatory he said:

Ques. 5. If he left a widow surviving him, give her name also.

Ans. 5. He left a widow named Eunice Buck. She died, I think, in 1859.

To the sixth interrogatory he said:

Ques. 6. Were you acquainted with a lot of land in *in* Wilmington, North Carolina, which Erastus Buck purchased from John Swann and wife and the trustees of Mrs. Swann?

Ans. 6. Yes; I was acquainted with it. I knew at the time when my father purchased it, but I cannot state in just what year it was.

To the seventh interrogatory he saith:

Ques. 7. If you shall answer in the affirmative, state who had the possession and control of that lot from the death of said Erastus Buck up to the sale by the sheriff in 1843.

Ans. 7. I was in Wilmington only one year after my father died. Will-

iam A. Wright, of said Wilmington, was appointed administrator of my father's estate. He first rented it from year to year for four years. Myself and my uncle Isaac Wells, partners as Wells & Buck, rented a part of said lot of said administrator the first year, and P. W. Fanning rented another shop on the same lot. In the distribution of my father's estate a portion of said lot was set out to my mother, and she rented it to a man by the name of Wood, I think from Rhode Island, who took a lease of it for the balance of my mother's life. Said portion of the lot subject to my mother's life estate was sold at auction for the benefit to a man by the name of Parsley. After I left Wilmington in August, 1840, I
48 do not know who had the actual possession and control of said lot; and further, deponent saith not.

SILAS BUCK.

The foregoing deposition was by me reduced to writing in the presence of the witness and read over to him, and was subscribed by him in my presence.

[SEAL.] CHARLES E. GROES,
Commissioner and Notary Public.

B.—*Alice Heron's will.*

In the name of God, amen.

I, Alice Heron, of Wilmington, in North Carolina, being of sound and perfect mind and memory, but considering the uncertainty of this mortal life, do make and publish this my last will and testament in manner and form following (that is to say): First, I give and bequeath unto my nephew, Marsden Campbell, to himself, executors, administrators, and assigns, forever, the following negro slaves: Primus, Sally, John, Sarah, and Lucy, but subject to the payment of all my just debts due or owing at the time of my decease, and my executors hereinafter named are hereby authorized and directed to sell and dispose of the above-mentioned slaves, if necessary, for the payment of my debts of whatsoever nature. I also give and devise to my nephew, John R. London, to himself, his heirs, and assigns, forever, in fee-simple, all that lot of ground in the town of Wilmington bounded to the northward by the lot whereon the said
49 John R. London's office now stands; to the westward by Front street; to southward by Chestnut street, and to the eastward by Second street. I give and bequeath to my grandchildren William and Mary McKenzie, as a testimonial of sincere affection and esteem, each a gold watch, to be purchased and paid for by my executors, and the amount deducted from the proceeds of property hereinafter directed to be sold.

I give and devise to my executors hereinafter appointed all that tract of land lying between the southern boundary of Wilmington and the Greenfield plantation; also all my land lying on or near Long Creek, in the county of New Hanover, to be sold by my executors, or the survivor or the executor of such survivor, and the money arising from the sale of said tract or tracts (first deducting my legacies to Wm. and Mary McKenzie) to be loaned upon interest until it shall amount to fifteen hundred dollars, and then such sum to be expended by my executors, or the survivor of the executor of such survivors, in the improvement of my

lots hereinafter devised in trust to the use and benefit of my granddaughter Frances Swann. I give and devise all the residue of my real estate of whatsoever nature and kind to John Waddell and John R. London, and the survivor and the executor of such survivor, to the use of said John Waddell and John R. London, and the survivor and executor of such survivor, in trust and confidence for the several interests and purposes, provisions and limitations, hereinafter expressed and declared; that is to say,

to the separate use and behoof to the said Frances Swann for and
50 during her life, and after her death, in trust as aforesaid, to the use of such child or children as may be alive at her decease, or in case of my granddaughter Frances demise without children or a child, but leaving the issue of such child or children, then to the uses of such children or a child, but leaving the issue of such child or children, then to the uses of children or child as last mentioned. Provided, however, that if at the death of my granddaughter Frances neither her issue or the child or children of such issue shall be at the age of twenty-one years, or after the death of my granddaughter none of her issue or the children of her issue shall arrive to the age of twenty-one, then, and then only, to the use of those who would have inherited my estate had Frances died without issue or children of such issue in my life-time.

I give and bequeath all the rest of my negro slaves to John Waddell and John R. London, and the survivor, and the executor of such survivor, in trust to and for the several uses, purposes, and limitations declared as above.

I give and bequeath all the residue of my personal estate to my granddaughter Frances.

And it is *will* my will that the trustees aforesaid, and the survivor, and the executor of such survivor, in the soundness of their discretion, may join with the cestui que use or guardian of cestui que use in making any conveyance of the above property settled in trust as aforesaid as may to them seem proper.

I hereby appoint John Waddell and John R. London my executors, who, as trustees aforesaid, may retain funds to insure my property, and in

case of accident m'y apply the insurance money to the improvement
51 of the real estate to them devised as trustees; and it is expressly my meaning (and by no implication or construction to be otherwise understood) that the trustees as aforesaid shall in no wise be liable on any account unless for rents or profits by them actually received, and that over and above what may be by them retained for insurance and necessary disbursements.

In witness of all which I have hereunto set my hand and seal this second of May, anno Domino 1811, XXXV Independence.

A. HERON. [SEAL.]

Signed, sealed, and declared by the above-named Alice Heron to be her last will and testament, in the presence of us, who have hereunto subscribed our names as witnesses in the presence of the testatrix.

THOMAS WRIGHT.
JAMES S. GREEN.

County court, New Hanover County, May term, 1813.

The execution of this will was proven by James S. Green, one of the

subscribing witnesses thereto, and ordered to be recorded; and at the same time John R. London qualified as executor thereto.

Witness:

THOMAS F. DAVIS, *Clk.*

52 New Hanover County, in the probate court.

I hereby certify that the foregoing is a true and literal [?] of the original will of Alice Heron, now on file in this court, said will being recorded in book of wills A, page 317.

In testimony whereof I have hereunto set my hand and affixed my official seal at office, in Wilmington, this 4th day of September, A. D. 1871.

[SEAL.] J. C. MANN,
Judge of Probate.

Bill of costs.

Superior court, Columbus County.

FREDERICK J. SWANN AND OTHERS, PLAINTIFFS,
against
GEORGE MYERS AND OTHERS, DEFENDANTS.

Bill of costs, New Hanover County:

F. & D.	$2 00
Sheriff Black	60
Clerk Mann	8 30
" Heaton	17 50
	$28 40

Columbus County:

Clerk W. M. Baldwin	$34 15
Sheriff J. W. Taylor	3 00
53 Sheriff Manning	$6 60
Attorney	10 00
Witness Wm. Larkins	6 60
" L. A. Hart	6 60
" S. D. Polly	22 70
	$118 05

Certificate.

I, William M. Baldwin, clerk of the superior court in and for the county of Columbus, do hereby certify that the foregoing transcript of the case Frederick J. Swann and others, against George Myers and others, is a true transcript from the original papers on file in the superior court clerk's office of said county.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Whiteville, this 11th day of November, A. D. 1878.

W. M. BALDWIN, *C. S. C.*

54 *Proceedings of November term*, 1878.

And at the November term, 1878, of said court, begun and held for said district, in the city of Raleigh, on the last Monday of November, being the 25th day of said month, before the honorable Hugh L. Bond, circuit judge, presiding, and the honorable Geo. W. Brooks, district judge of said district, the following proceedings are had and entered of record in said cause, to wit: Motion by defendant for continuance. Motion argued and allowed.

Proceedings of June term, 1879.

And at the June term, of said court, 1879, begun and held in the city of Raleigh, for the district aforesaid, on the first Monday in June, being the 2nd day of said month, before the honorable Hugh L. Bond, circuit judge presiding, and the honorable Geo. W. Brooks, district judge, come the parties aforesaid, by their attorneys, and thereupon further day is given to the parties, to wit, the last Monday in November, 1879.

55 *Proceedings of November term*, 1879.

At which last-mentioned day, at the court room of said court; in the city of Raleigh, before the honorable Hugh L. Bond, circuit judge, presiding, and the honorable Geo. W. Brooks, district judge, the parties aforesaid, by their said attorneys come, and thereupon the following judgment is rendered and entered of record in said cause, to wit:

Judgment remanding the cause.

FREDERICK J. SWANN AND OTHERS
against
GEORGE MYERS AND OTHERS.

This action coming on for hearing upon a motion, after notice to the defendants, to remand the same to the State court, and said motion having been debated by counsel, the court is of opinion that the action in its present form cannot be maintained in this court; and it is ordered and adjudged that the same be remanded to the superior court of Columbus County, North Carolina, to be therein proceeded with according to law.

It is further ordered and adjudged that in case an appeal or writ of error shall be prosecuted upon this order, remanding the action to the State court, that the defendant, George Myers, give a justified bond for a supersedeas in the sum of ten thousand dollars, to be passed upon by the
56 clerk, and that if a supersedeas is not asked for that he give a justified bond for five hundred dollars for costs.

(Signed) HUGH L. BOND, *C't Judge.*

Writ of error applied for and granted; and it is considered by the court, that the defendant, George Myers, pay all the costs incurred herein in this court, and that execution issue therefor, if need be.

57 *Citation.*

UNITED STATES OF AMERICA, *ss*:

To Frederick J. Swann, Alexander D. Waddell & wife Lucy, Frederick W. Swann, F. J. Swann, jr., by his next friend the said Frederick W. Swann; Ann Swann, and Mary Hill, William S. London, Henry A. London, jr., Frank London, Ann M. Zimmerman, John R. London, Fred. H. London, Snowdon & Eliza London his wife, William L. De Rossett, Thomas C. De Rossett, Armand J. De Rossett. jr., M. J. De Rossett, Catherine G. Meares, Graham Davis and Alice his wife, Charles D. Myers and Eliza his wife, and Gabriella De Gordon De Rossett, Robert Cowan De Rossett, and Kate De Rossett, and Frederick J. Lord, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of North Carolina, wherein George Myers is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

58 Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 30th day of March, in the year of our Lord one thousand eight hundred and eighty.

N. J. REDDICK,
Clerk U. S. Circuit Court, Eastern District of North Carolina.

(Endorsed:)
Service accepted March 30th, 1880, at Raleigh, N. C.
BATTLE & MORDECAI,
Of Counsel for Defendants in Error.

59 *Assignment of errors.*

Supreme Court of the United States.

F. J. SWANN AND OTHERS
against
GEORGE MYERS.

Exceptions of the defendant to the judgment and order of the court.

The said George Myers, by his attorney, says that in the record and proceedings aforesaid there is manifest error in this:

That by the record and proceedings aforesaid it appears that the judgment of the court was that the said action be remanded to the superior court of Columbus County, North Carolina, to be therein proceeded with according to law; whereas by the law of the land said action could be well maintained in its present form in the said circuit court of the United States. The said George Myers prays that the judgment aforesaid may be

reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of said judgment.

GILLIAM & GATLING,
Def'd'ts' Attorneys.

59½ *Rejoinder.*

In the Supreme Court of the United States.

F. J. SWANN AND OTHERS
against
GEORGE MYERS.

And afterwards, the said F. J. Swann and others, by their attorneys, Battle & Mordecai, come and say there is no error in the record and proceedings aforesaid, or in giving the judgment aforesaid, and they pray that the Supreme Court of judicature may proceed to examine as well the record and proceedings aforesaid the matters aforesaid above assigned for error; and that the judgment aforesaid, in form aforesaid given, may be in all things confirmed.

BATTLE & MORDECAI,
Of Counsel for Def'd'ts in Error.

60 *Bond.*

Supreme Court of the United States.

FREDERICK J. SWANN, ALEXANDER D. WADDELL, and wife Lucy, Frederick W. Swann, F. J. Swann, jr., by his next friend the said Frederick W. Swann; Ann Swann, & Mary Hill, plaintiffs,
against
GEORGE MYERS, WILLIAM S. LONDON, HENRY A. London, jr., Frank London, Ann M. Zimmerman, John R. London, Fred. H. London, Snowden and Eliza London, his wife, William L. De Rossett, Thomas C. De Rossett, Armand J. De Rossett, jr., M. J. De Rossett, Catherine G. Meares, Graham Davis and Alice, his wife, Charles D. Myers and Eliza, his wife, and Gabriella De Gordon De Rossett, Robert Cowan De Rossett, and Kate De Rossett, infants under the age of 21 years, and Frederick J. Lord, defendants.

Know all men by these presents, that we, George Myers and L. A. Hart and H. A. Burr, of the city of Wilmington, North Carolina, are held and firmly bound unto Frederick J. Swann, Alexander D. Waddell and wife Lucy, Frederick W. Swann, F. J. Swann, jr., Ann
61 Swann, and Mary Hill, of said State of North Carolina, in the sum of five hundred dollars, to be paid to the said Frederick J. Swann, Alexander D. Waddell and wife Lucy, Frederick W. Swann, F. J. Swann, jr., Ann Swann, and Mary Hill, their executors and administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, ex-

ecutors, and administrators, firmly by these presents. Sealed with our seals. Dated this 8th day of January, 1880.

Whereas the above-named George Myers hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the eastern district of North Carolina, in the fourth circuit:

Now, therefore, the condition of this obligation is such that if the above-named George Myers shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

GEORGE MYERS. [SEAL.]
L. A. HART. [SEAL.]
HENRY A. BURR. [SEAL.]

62 UNITED STATES OF AMERICA,
State of North Carolina:

Before me, E. H. McQuigg, a commissioner duly appointed by the circuit court of the United States for the eastern district of North Carolina, come the said George Myers and L. A. Hart and Henry A. Burr, and being by me first duly sworn depose and say, each for himself, that he is worth the sum of one thousand dollars over and above all of debts, liabilities, and exemptions.

GEORGE MYERS.
L. A. HART.
HENRY A. BURR.

Sworn to and subscribed before me, at office, in the city of Wilmington N. C., this 8th of January, 1880.

[SEAL.] E. H. McQUIGG,
United States Commissioner, Eastern District of North Carolina.

63 *Certificate.*

I, N. J. Riddick, clerk of the circuit court of the United States in and for the eastern district of North Carolina, do hereby certify that the foregoing contain a full, true, and perfect transcript of the record of said court in the case of T. J. Swann and others against George Myers.

In testimony whereof I have hereunto set my hand and seal of said court at office, in the city of Raleigh, in said district, this 15th day of May, in the year of our Lord 1880, and of our Independence the 104th.

[SEAL.] N. J. RIDDICK, *Clerk.*

(Indorsement on cover:) No. 252. Mary E. Myers, widow of George Myers, deceased, in her own right and as next friend of Arthur H. Myers, Ethel P. Myers, and Elmer K. Myers, infant children and heirs at law of George Myers, deceased; Caroline Kellock & Cornelius M. Kellock, her husband, Robert C. Myers, George B. Myers, Kate M. Myers, and James C. Myers, heirs at law of George Myers, deceased, plaintiffs in error, vs. Frederick J. Swann, Alexander D. Waddell and wife Lucy, Frederick W. Swann, F. J. Swann, jr., by his next friend Frederick W. Swann, Ann Swann, et al. E. North Carolina C. C. U. S. Filed 17th August, 1880.

17546

In the Supreme Court of the United States.

No. 252.

MARY E. MYERS ET AL., PLAINTIFFS IN ERROR,
vs.
FREDERICK J. SWANN ET AL

In Error to the Circuit Court of the United States for the Eastern District of North Carolina.

T. T. CRITTENDEN,
FRANKLIN H. MACKEY,
Of Counsel for Plaintiffs.

In the Supreme Court of the United States.

No. 252.

MARY E. MYERS ET AL., PLAINTIFFS IN ERROR,
vs.
FREDERICK J. SWANN ET AL

In Error to the Circuit Court of the United States for the Eastern District of North Carolina.

At the spring term, 1873, of the superior court of New Hanover county, in the State of North Carolina, the defendants in error, Frederick J. Swann, Alexander D. Waddell and his wife Lucy, Frederick W. Swann and his wife Rebecca, Ann Swann, Arthur J. Hill and his wife Mary, filed their original complaint against George Myers, defendant, claiming certain real estate described in said complaint, Rec., pp. 4, 5 and 6, and asking judgment for possession of said real estate and $5,000 damages for withholding the same. At the June term, 1875, on motion of the plaintiffs it was ordered that this cause be removed for trial to the county of Columbus in said State. Rec., p. 7.

On the 13th day of March, 1876, in said superior court of said Columbus county, said cause was tried and verdict and judgment rendered thereon in favor of the defendant. Rule for new trial and rule discharged. Appeal taken to the Supreme Court ; said judgment was reversed and new trial ordered. At the spring term, 1877, of said superior court of said Columbus county, an amended complaint was filed by leave of the court, making additional parties defendants in said cause, Rec., p. 9, *et seq.* To the amended complaint said defendant, George Myers, on the 8th day of September, 1877, filed his separate answer. Rec., p. 15.

On the 11th day of March, 1878, said defendant, George Myers, filed in said superior court of Columbus county, his petition, duly sworn to by him and accompanied by a proper and sufficient bond for the removal of said cause to the Circuit Court of the United States for the Eastern District of North Carolina, (Rec., pp. 19 and 20), which motion for removal was denied and disallowed by said court. (Rec., pp. 20 and 21.) From which judgment said defendant, George Myers, prayed an appeal to the Supreme Court of the State of North Carolina. And said Supreme Court, at its June term, 1878, reversed said last judgment (Rec., pp. 21 and 22) and at the fall term, 1878, of said superior court of Columbus county, it was ordered that this cause be removed to the Circuit Court of the United States for the Eastern District of North Carolina (Rec., p. 22), which was done.

At the June term, 1879, of said Circuit Court of the United States, by the order of said court, said cause was remanded to the said superior court of Columbus county to be therein proceeded with according to law, and from this judgment remanding said cause this writ of error is prosecuted. Rec., p. 28.

Since this cause was brought by writ of error to this court said George Myers departed this life and the cause was revived by order of this court in the names of the present plaintiffs in error.

Points.

1. The substantial controversy in this cause is between the representatives of George Myers, deceased, and the defendants in error.

2. If the original plaintiff in error, George Myers, was competent to sue the defendants in error in the Circuit Court of the United States, the representatives of said George Myers, though citizens of the same State as the defendants in error, may revive said action.

3. The facts that this action had been tried, judgment rendered thereon, and said judgment reversed by the Supreme Court of the State of North Carolina and sent back for a new trial thereof, did not preclude the removal of the cause to the Circuit Court of the United States.

1. The substantial controversy in this cause is between the representatives of George Myers, deceased, and the defendants in error.

To sustain this position it is only necessary to quote the opinion of Rodman, justice, in the case of F. J. Swann et al. *vs.* George Myers et al., reported in 79 North Carolina Reports, 101, in which he says: "This is a motion by Myers, one of the defendants, to remove the action to the Circuit Court of the United States for trial upon the ground of prejudice or local influence under the act of the 2d of March, 1867. Rev. Stat. of U. S., Sec. 639, and 2 Abbott's Practice, 39.

All the plaintiffs are citizens and residents of North Carolina, as are all the defendants, except Myers, who is a citizen and resident of New York. If Myers were the only defendant, there would be no objection to granting his motion. We understand it to be settled, however, by the cases of the Sewing Machine Co., 18 Wall., 553; Vanver *vs.* Bryant, 21 Wall., 41, and Gardner *vs.* Brown, Ib., 36, that if the other defendants are necessary parties to the action without whose presence in court no full or final determination of the matter in controversy can be made, the defendant Myers is not entitled to have his motion granted. Then, are the other defendants, or any of them, such necessary parties?

For the intelligible consideration of this question it is necessary to state in a summary way the claims of the parties upon what seem to be the undisputed facts.

Alice Heron, being seized in fee of the land in question, made her will and died in 1813. By said will she devised the residue of her land (which included that in question) "to John Waddell and John R. London and the survivor,

and *the executor of such survivor*," in trust for the separate use of Frances Swann (her grandaughter) for life, with remainder to her children living at her death, and in default of children living at her death, in trust for the issue of her children, and in default of such issue, who arrive at the age of twenty-one, then to her own heirs.

By a subsequent clause of her will the testatrix provided as follows:

"And it is my will that the trustees aforesaid, and the survivor, and the executor of the survivor, in the soundness of their discretion, may join with the *cestui que use*, or guardian of *cestui que use*, in making any conveyance of the above property settled as aforesaid, as may to them seem proper."

Of the executors named, London alone qualified. He survived Waddell and died, leaving a will by which he made Marsden Campbell and William C. Lord his executors.

On the 12th of February, 1836, a deed, professing to be under the power in the will, was made by John Swann and the said Frances, his wife, and the said Lord, and the said Campbell, by said Lord, as his attorney, conveying said land to one Buck, under whom defendant Myers claims; and he, and others, who claim under him, have been in possession ever since.

There is no evidence other than that appearing in the deed that Lord was the attorney of Campbell. Lord survived Campbell; the defendants (except Myers) are his heirs, and the plaintiffs are the children or issue of Frances Swann and also heirs of Alice Heron. Frances Swann died in 1871.

The case came before this court at June term, 1876, on an appeal by the plaintiffs. (75 N. C., 585.) The *decision* of the court granted a new trial. The opinion of the court, however, held:

(1.) That the deed to Buck was not a valid execution

of the power, for want of execution by Campbell, and it consequently did not convey a fee simple.

(2.) That it did convey the equitable life estate of Frances Swann, and that the possession of Buck and his assignee did not become adverse until her death in 1871.

(3.) It expressed a doubt as to whether, upon the death of Lord, the bare legal estate descended to his heirs (the defendants, except Myers), or reverted to the heirs of Alice Heron. This question, however, is merely one of form, and of no practical importance, for if there be a trust outstanding for the plaintiffs, the court will compel the trustees, whoever they may be, to hold the legal estate for them. It seems sufficiently clear though that by force of section 45 of chap. 119 of Bat. Rev. (Wills), by which all devises are construed to be in fee unless otherwise expressed, that Lord took a fee, and the legal estate descended to his heirs.

If this court shall decide that the case cannot be removed, it can only be on the ground taken by the plaintiffs that the defendants (except Myers) are trustees and hold the legal estate ; which would be to decide that they are trustees for the plaintiffs and bound to convey to them. It is not and cannot be contended that the said defendants are trustees for Myers. His claim is and must necessarily be that the legal estate passed to Buck, either by the deed of 1836, or by an adverse possession beginning at that time, and is now in him as the assignee of Buck. The only substantial question in the case is whether the said defendants are trustees. By refusing to remove the case on the ground that said defendants are trustees, and therefore necessary parties to a full determination of all matters in controversy, this court would decide against the defendant the only matter in controversy ; it would refuse to him a trial of his claim by a court which he believes more free from prejudice and local influence than a State court, because, in our opinion,

he has no legal claim. We are of the opinion that the title of the plaintiffs can be tried and adjudged in the absence of the said defendants who are alleged to be trustees for the plaintiffs, and whose estate, if any, is merely a nominal one. The plaintiffs claim only an equitable estate, and can, under our law, recover upon that. They might have joined the nominal defendants with them as plaintiffs, and they may be more naturally arranged on that side. That they have been put on the same side with the defendant Myers, with whom they have no community, but an opposition of interest, ought not to prejudice his rights. Their interests, as far they have any, are with the plaintiffs, who claim them as their trustees, and such they are, if they have any legal interest at all; and if those defendants had been made nominally plaintiffs as substantially they are, there could be no question as to the right of Myers to remove the case.

We think this motion should be allowed, and the case removed to the Circuit Court of the United States, and an order will issue to the superior court of Columbus to that effect."

If the real controversy is between citizens of different States, the case is within the constitutional grant of Federal judicial power, notwithstanding some of the adversary parties may happen to be citizens of the same State.

Donohoe *vs.* Mariposa Land Co., 5 Sawyer, 170.

Dillon on Removal of Causes, p. 30.

Wood et al. *vs.* Davis, 18 How., 467.

Removal Cases, 100 U. S. Rep, pp. 457–482.

Barney *vs.* Latham, 113 U. S. R., 205–216. (The decision in this case rendered in October, 1880, disposes, we think, of all the questions involved in the case at bar.)

Hewitt *vs.* Phelps, 105 U. S. R., S. C., pp. 313 *et seq.*

"The intention of Congress—plainly expressed in the act of March 3, 1875, was, that where the main controversy was between citizens of different States, it was removable, and carried with it all the incidents; and that a mere incident would not prevent the case from being removed."

103 U. S. R., pp. 212–216; Id., pp., 335–336.

Donohoe *vs.* Mariposa Land Co., 5 Sawyer, 170–171.

Dillon on Removal of Causes, p. 35, note.

Goodenough *vs.* Warren et al, 5 Sawyer, 497, and cases cited (1879). (In this case the question arose under Sec. 639, U. S. Rev. Stat., and Sawyer, J., concurred with Judge Deady.)

Girardy *vs* Moore et al., 5 Cent. L. J., 78, 79 (1877).

Wormsee *vs.* Dahlman, The Reporter, Vol. 7, 740–1 (1879).

Taylor et al. *vs.* Rockafeller et al., The Reporter, Vol. 6, pp. 226–230 (1878).

2. If the original plaintiff in error, George Myers, was competent to sue the defendant in error in the Circuit Court of the United States, the representatives of said George Myers, though citizens of the same State as the defendants in error, may revive said action.

Clarke, adm'r, *vs.* Mathewson et al., 12 Peters, 164.

The facts that this action had been tried, judgment rendered and said judgment reversed by the Supreme Court of the State of North Carolina, and sent back for a new trial thereon, did not preclude the removal of the cause to the Circuit Court of the United States.

Hewitt *vs.* Phelps, 105 U. S. Rep., 393.

T. T. CRITTENDEN,
FRANKLIN H. MACKEY,
Of Counsel for Plaintiffs in Error.

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OFFICE SUPREME COURT U. S.
FILED
APR 13 1883.
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 252.

MYERS AND OTHERS *vs.* SWANN AND OTHERS.

BRIEF FOR THE DEFENDANTS IN ERROR.

S. F. PHILLIPS,
For Defendants in Error.

JUDD & DETWEILER, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 252.

MYERS AND OTHERS *vs.* SWANN AND OTHERS.

BRIEF FOR THE DEFENDANTS IN ERROR.

The *error* assigned in this case questions an order *remanding* to a State court an action previously *removed* therefrom, under the 3d clause of section 639 of the Revised Statutes; *i. e.*, the "local-prejudice" statute of 1867, (below, p. 4.)

The action was brought in the superior court of New Hanover county, North Carolina, returnable to June term, 1873. Inasmuch as at that time that court held *four* terms during the year, (Battle's N. C. Digest, p. 140,) and as under the *code* of the State actions were returnable in term time, and stood for trial at the term succeeding the return, (Battle, p. 248,) this action was *pending for trial* at the time of the passage of the Removal act of 1875. Therefore, this application to remove, which was made in March, 1878, (after the cause had been removed for trial to another county in North Carolina, and also after it had been tried, and such trial had been set aside in the State supreme court,) can in no event rest upon that act. The latest opportunity for a removal under the act of 1875 was at March term, 1875, of New Hanover court.

Removal cases, 100 U. S., 457.
Bible Society *vs.* Grove, 101 U. S., 610.
Babbitt *vs.* Clark, 103 U. S., 606.

Inasmuch, also, as the act of 1875 repealed the second clause of section 639 (*i. e.*, the Removal act of 1866, Hyde *vs.* Ruble, 104 U. S., 407,) there is no authority for the application in question other than that to be found in the statutory provision expressly relied upon therein; that is, section 639, clause 3, (given below.)

One principal question, therefore, is whether such provision is sufficient.

An outline of the case upon the record is as follows:

By virtue of a will made in 1811, certain lands were devised to trustees, in trust for a Mrs. Swann for life and afterwards for the plaintiffs in fee; a power to sell the fee was also given to Mrs. Swann, in conjunction with her trustees; she attempted to sell accordingly, but executed the power defectively, (Swann *vs.* Myers, 75 N. C., pp. 595, 596;) the right so conveyed, together with possession thereunder, in the end devolved upon the defendant Myers; and Mrs. Swann has recently died, as also have the original trustees—the defendants other than Myers having succeeded to the rights and duties of the latter. The relief demanded is, *possession* as against Myers and *title* as against the trustees.

Originally the action was against Myers alone, and demanded only *possession;* but upon its coming before the supreme court of North Carolina, after the trial above referred to, that tribunal suggested that the trustees should be brought in, so that the legal title might be represented, and might also, in case of their success, be adjudged to the plaintiffs. Thereupon the complaint was amended by adding the trustees (who had refused to become *plaintiffs*, folio 25,) as defendants, and by demanding also title. The trustees did not answer; but Myers, by leave, amended his former answer, and at the same term also applied for this removal. It was refused in the superior court, but upon appeal to the State

supreme court was allowed, upon the ground that the trustees were merely formal parties to the action. (79 N. C. Reps., 101.)

However, after the removal into the circuit court of the United States, upon motion the action was *remanded*, the learned judges expressing very briefly their opinion that "*the action in its present form cannot be maintained in this Court.*" Folio 55.

It is submitted that the present writ of error is invalid, upon two accounts:

1. Because the record should have been brought into this Court by appeal, and not by writ of error.

2. Because the action was not removable under the provision cited in the petition—the 3d clause of section 639; no other provision in the meantime (as said above) being applicable.

1. The proper process for bringing the record below into this Court was by *appeal.*

The action is by *cestuis que trusts* against trustees, and a purchaser from trustees. A bare statement of this fact indicates that upon its being removed into the circuit court of the United States the action was to be placed upon the equity docket. Whether all the relief asked for could be granted by that court might afterwards become a question, but *prima facie*, the action was by plaintiffs who, in the character which they asserted, had no place of standing in a court of law, *i. e.*, could raise no question there.

The North Carolina Code in order to carry out a constitutional provision (adopted in 1868) *abolishing* "the distinction between actions at law and suits in equity," and reducing all such to the single form of "a civil action," (Battle's

Digest, 137,) allows all actions to be prosecuted in the name of *the real party in interest.* (Ibid., p. 153, (55.)

However, *legal* and *equitable* estates continue to be distinguished in other respects as before.

In Matthews *vs.* McPherson, 65 N. C., 189, (A. D. 1871,) which was an action to recover possession of land, brought by a *cestuis que trust* against a vendee of the trustee, the supreme court said: "The distinction between actions at law and suits in equity as to the forms of procedure has been abolished in this State; but the distinction between legal and equitable rights still remains." And thereupon it went on to show why in the circumstances of that case the plaintiffs could not maintain their action.

The suggestions of the same court in the present case, 75 N. C. Repts., (above p. 1,) are to the same effect.

In Hurt *vs.* Hollingsworth, 100 U. S., 100, this court gives the rule (p. 103) which governs suits originally brought under codes, and transferred into courts of the United States: "A party who claims a legal title must, therefore, proceed at law; and a party *whose title or claim is an equitable one* must follow the forms and rules of equity proceedings as prescribed by this court."

That was a suit brought by one who had the legal title to certain lands, and demanded equitable relief, *i. e.*, the removal of a cloud thereon. Having originally been brought under the Texas Code, it was held that upon *removal* its proper place was the equity docket.

It appears by the judgment remanding this case (folio 50) that the attention of the plaintiffs in error was called expressly to the question whether they ought not to *appeal.*

2. The action was not removable under the 3d clause of section 639.

That clause, in its connection, is as follows:

SECTION 639. "Any suit commenced in any State court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court, may be removed for trial into the circuit court for the district where such suit is pending, next to be held after the filing of the petition for such removal, hereinafter mentioned, in the cases and in the manner stated in this section."

* * * * * * * * *

"*Third.* When a suit is between a citizen of the State in which it is brought and a citizen of another State, it may be so removed, on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if before or at the time of filing said petition he makes and files in said State court an affidavit stating that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court."

I submit the following points:

(*a*) The supreme court of North Carolina were mistaken in holding that, under the above clause, it is competent to raise a question whether or not some of the parties on either side are merely *formal.*

(*b*) Considering the scope of the plaintiffs' action, and such scope (supposing no rule of pleading or practice to be violated) is for them alone to decide, the trustee defendants are necessary parties.

(*a*) The above clause does not warrant a question as to how many and who of the parties to a cause are merely *formal.*

In this case the State court assumed to say that so many of the defendants as are citizens of North Carolina are merely formal parties, and thereupon to hold that, for the purpose of removal, Myers alone is defendant. 79 N. C., 101, (above.)

For this they cite three cases in this Court:

1. Sewing-Machine Companies, 18 Wall., 553.

That was a case under the act of 1867, the wording of which differs materially from that of the above clause. The counsel who argued in favor of removal placed much of the stress of their argument upon the words which constitute that difference: They also put a case involving defendants some of whom should be merely *formal* parties. However, the court refused the removal asked for. I do not find anything in the opinion to countenance the view suggested in 79th North Carolina.

2. Vandever *vs.* Bryant, 21 Wall., 41.

This also was under the act of 1867, and there is nothing in the judgment or in the opinion that supports the view under consideration.

3. The only other case cited is that of Gardner *vs.* Brown, 21 Wall., 36.

This was under *the act of* 1866; and the application to remove was refused because the record disclosed no *controversy* to which the non-resident defendant was *sole* party.

This case, therefore, is not in point. As already said, the act of 1866 has been repealed, and at the time when the application in question was made the time had long passed for making it under the act of 1875.

I submit that it was an inadvertence upon the part of the learned North Carolina court to hold that the clause in question allowed of such inquiry and determination as that upon which their judgment was made to turn.

(*b*) Considering the scope of the plaintiffs' action, and that is the proper test to be applied, the citizens of North Carolina who are defendants, are necessary parties.

Under the North Carolina code the proceeding in one action for both title and possession, is competent; and it seems pertinent to call attention to the circumstance, that in the present case such union of remedies is due to a suggestion made by the supreme court of the State. It was therefore a thing done without by-ends, and in perfect good faith.

Unless by virtue of some positive statutory provision like that of the acts of 1866 and 1875, courts have no power to divide up actions which have been regularly brought.

S. F. Phillips,
For Defendants in Error.